

PROCESS RULE MEETING

January 9, 2018

ISSUES TO DISCUSS

- ▶ Direct Final Rules (DFRs)
- ▶ The Energy Independence and Security Act of 2007 (EISA 2007) amended the Energy Policy and Conservation Act of 1975 (EPCA) to grant DOE authority to issue a “direct final rule” to establish energy conservation standards. (42 U.S.C. 6295 (p)(4)(A))
- ▶ Specifically, DOE may issue a DFR adopting energy conservation standards for a covered product or equipment upon receipt of a joint proposal from a group of “interested persons that are fairly representative of relevant points of view,” provided DOE determines the energy conservation standards recommended in the joint proposal conform with the requirements of 42 U.S.C. 6295(o) or 42 U.S.C. 6313(a)(6)(B).

Direct Final Rules

- ▶ Simultaneous with issuance of the DFR, DOE must also issue a notice of proposed rulemaking (NOPR) containing the same energy conservation standards as in the DFR.
- ▶ DOE must solicit public comment for a period of at least 110 days; then, not later than 120 days after issuance of the DFR, the Secretary must determine whether any adverse comments “may provide a reasonable basis for withdrawing the DFR.”
- ▶ If withdrawn, the Secretary must proceed with the rulemaking process under the NOPR and publish the reasons the DFR was withdrawn.

Direct Final Rules (Cont.)

- ▶ If the Secretary decides not to withdraw the DFR, it becomes effective as specified in the original issuance of the DFR.
- ▶ In response to a 2011 DFR establishing energy conservation standards for residential furnaces, central air conditioners, and heat pumps that was challenged in the D.C. Circuit, a joint motion was filed by all parties presenting final terms of a settlement.
- ▶ Pursuant to the Joint Motion, DOE published an RFI on October 31, 2014 seeking public input on several aspects of the DFR process.

Direct Final Rules (Cont.)

- ▶ Request for Comment:

- DOE seeks comment on whether to amend the Process Rule to include provisions related to the use of DFRs.

Direct Final Rules (Cont.)

- ▶ With respect to the consideration of adverse comments, DOE has, to date, used the following balancing test:

DOE considered the substance of all adverse comments received (rather than quantity) and weighed them against the anticipated benefits of the Consensus Agreement and the likelihood that further consideration of the comments would change the results of the rulemaking. DOE does not consider adverse comments that had been previously raised and addressed at an earlier stage of the rulemaking.

Direct Final Rules (Cont.)

- ▶ Request for comment:

- DOE seeks comment on the balancing test, created as part of the 2011 DFR, and what would constitute a change in results (in either the standards or supporting analyses) that would be sufficient to provide a reasonable basis for the agency to withdraw the DFR.

Direct Final Rules (Cont.)

- ▶ DOE seeks further comment on the three issues from the October 2014 RFI. The three issues are:
 - (1) When a joint statement with recommendations related to an energy or water conservation standard would be deemed to have been submitted by “interested persons that are fairly representative of relevant points of view;
 - (2) The nature and extent of “adverse comments” that may provide the Secretary a reasonable basis for withdrawing the DFR, leading to further rulemaking under the accompanying NOPR; and
 - (3) What constitutes the “recommended standard contained in the statement,” and the scope of any resulting DFR.

Direct Final Rules (Cont.)

- ▶ DOE seeks comment on what constitutes a relevant point of view and whether DOE should ensure that all relevant points of view have been taken into account before issuing a DFR.
- ▶ DOE seeks comments on the strengths and weaknesses of using the DFR process to promulgate energy conservation standards.

Negotiated Rulemakings

- ▶ Negotiated rulemaking is a process for attempting to develop a consensus proposal for a proposed regulation in consultation with interested parties, in accordance with the requirements of the Negotiated Rulemaking Act.
- ▶ DOE has used negotiated rulemakings as a means to engage the public, gather data and information, to advance the rulemaking process.
- ▶ Request for Comment: DOE seeks comment on whether to amend the Process Rule to include the use of negotiated rulemaking in appropriate cases.

Negotiated Rulemaking (Cont.)

- ▶ DOE seeks comment on any and all issues related to the use of negotiated rulemaking in the development of energy conservation standards, including how DOE can improve its current use of the process as envisioned by the Negotiated Rulemaking Act.
- ▶ DOE seeks comment on whether the Process Rule should be amended to provide for the use of a convenor and facilitator for each negotiated rulemaking.
- ▶ DOE also requests comment on amendments to the Process Rule that would ensure that all reasonable alternatives are explored in the process, including not amending or issuing a standard, and alternatives that would affect different stakeholders differently and use of the DFR mechanism at the end of a negotiated rulemaking.

Procedures to Gather Information Early in the Rulemaking Process (Pre-NOPR stage)

- ▶ EISA 2007 eliminated the statutory requirement that DOE publish an ANOPR in standards rulemakings.
- ▶ But, DOE highly values public input early in the rulemaking process. DOE may continue to use the ANOPR or other alternative mechanisms to receive early input and supplemental information from stakeholders. DOE has also used Framework and Preliminary Analysis documents, Notices of Data Availability, and RFIs.

Procedures to Gather Information Early in the Rulemaking Process (Pre-NOPR) (Cont.)

► Request for Comment:

- DOE seeks comment on whether the Process Rule should be revised to eliminate references to mandatory use of an ANOPR prior to issuing a proposed rule, but maintain the ANOPR and/or include any of the alternative pre-rule steps previously mentioned.
- DOE requests comment on whether, and if so how, DOE should perform a retrospective review of current standards and associated costs and benefits as part of any pre-rule process.

Application of the Process Rule to Commercial Equipment

- ▶ By its terms (and specifically by its title), the Process Rule applies only to consumer products.
- ▶ However, DOE has generally used the same procedures when establishing standards for commercial equipment.
- ▶ Request for Comment:
 - DOE requests comment as to whether the Process Rule should be amended to clarify that it equally applies to the consideration of standards for commercial equipment.
 - DOE requests comments as to the advantages and disadvantages of applying the Process Rule to commercial equipment.

FOR ASHRAE EQUIPMENT SUBJECT TO STANDARD 90.1, EPCA PROVIDES A SEPARATE SET OF PROCEDURAL REQUIREMENTS AND TIMELINES THAT ARE DIFFERENT THAN ARE IN THE PROCESS RULE.

- If DOE were to amend the Process Rule to include commercial equipment, how should ASHRAE products be addressed.

Use of Industry Standards in DOE Test Procedures

- ▶ DOE routinely considers the test methods established in industry standards and often adopts such standards as the DOE test method.
- ▶ At the same time, DOE has chosen to sometimes alter the industry standards before they are adopted as the DOE test method.

Use of Industry Standards in DOE Test Procedures (Cont.)

- Request for Comment: DOE seeks comment on whether to modify the Process Rule to specify under what circumstances DOE would consider using the industry standard, without modification, as the DOE test procedure for a given product or equipment type.

Timing of the Issuance of DOE Test Procedures

- ▶ Currently, the Process Rule provides that final, modified test procedures will be issued prior to the NOPR containing proposed standards.
- ▶ Request for Comment: DOE seeks comment on whether the provisions of the Process Rule regarding the issuance of a final test procedure rule before issuing a proposed standards rule should be amended to ensure that DOE follows this process in developing test procedures and standards.
- ▶ For instance, provisions could be added to **require this sequence of events, or alternatively, provide for DOE's development of a schedule** that would address both the amendment of standards and changes to the relevant test procedure so that test procedure changes could be finalized prior to issuance of any proposed standard.

Certification, Compliance, and Enforcement

- ▶ DOE issues Certification, Compliance, and Enforcement regulations for all **product and equipment** categories to ensure consistency in meeting DOE's energy conservation standards and delivery of the expected energy and cost savings.
- ▶ Generally, DOE has issued these rules for groups of product or equipment categories in one rulemaking instead of individual product or equipment categories in separate rulemakings.
- ▶ Request for Comment: DOE seeks comment on whether any new or amended certification, compliance, and enforcement rulemaking should be proposed and finalized at the same time as the energy efficiency standards so that the agency can consider the full compliance costs when choosing the energy efficiency standard levels.

Standards Rulemakings

- ▶ Request for Comment: DOE seeks comment on how it could incorporate any potential cost or benefit impacts of the test procedure requirements in the decision-making for the energy efficiency standard levels.

Improvements to DOE's Analyses

- ▶ Process Rule objectives include increasing the use of outside technical expertise; eliminating problematic design options early in the process; conducting a thorough analysis of impacts (including social benefits and costs, distribution of costs, projection of technology progress and the associated price forecasts); and using transparent and robust analytical methods.
- ▶ Request for Comment: Given these goals, DOE seeks comment on ways in which the Process Rule can be amended to improve DOE's analyses and models, and to achieve burden reduction and increased transparency for regulated entities and the public.

Improvements to DOE Analyses (Cont.)

- ▶ DOE seeks comment on how to make the analyses and models more accessible by including improved instructions, user manuals, plain language descriptions, online tutorials, or other means.
- ▶ DOE also seeks comment on increasing the accuracy of the projections made within the analyses.

Other Issues

- ▶ DOE seeks comment as to whether it should add criteria to the Process Rule for “no amended standards” determinations, when supported by data and when standards with small anticipated energy savings would require significant upfront costs to achieve.
- ▶ DOE seeks comment as to whether it should add criteria to the Process Rule for consideration of voluntary, non-regulatory, and market-based alternatives as compared to establishing standards.

Other Issues (Cont.)

- ▶ DOE seeks comment as to whether DOE should add to the Process Rule criteria for consideration of establishing a baseline for energy savings for each covered product and equipment that would qualify as a “not significant” determination, thus rendering amended energy conservation standards as “not economically justified.”
- ▶ DOE seeks comment as to whether it should make compliance with the Process Rule mandatory.
- ▶ DOE seeks comments on topics not addressed in the current Process Rule and whether the Process Rule should be amended to address them.
- ▶ Any other comments or suggested improvements to the Process Rule?

Comment Deadline

- ▶ DOE requests that comments on the Process Rule RFI be submitted no later than February 16, 2018.
- ▶ Interested persons are encouraged to submit comments, identified by "Process Rule RFI," by any of the following methods:
- ▶ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- ▶ *E-Mail:* Regulatory.Review@hq.doe.gov. Include "Process Rule RFI" in the subject of the message.
- ▶ *Mail:* U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue, SW, Room 6A245, Washington, DC 20585.